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Supreme Court, U.S.
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No. 04-1381

IN THE

Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P., *et al.*,

Petitioners,

v.

WAYNE SMITH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF "SMITH RESPONDENTS" IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred in holding – contrary to decisions of this Court and the Third and Tenth Circuits – that a settlement class cannot be certified as a matter of law when the class purportedly could not be certified for litigation.

2. Whether the Seventh Circuit erred in holding – contrary to decisions of the Third and Tenth Circuits – that a settlement class representative cannot satisfy the "adequacy" requirement of Rule 23(a) as a matter of law when the class includes members of already-certified litigation classes.

PARTIES TO THE PROCEEDING

Petitioners are Sprint Communications Company, L.P., Qwest Communications Corporation, Level 3 Communications L.L.C., and WilTel Communications, L.L.C. Petitioners were defendants in the district court and appellees in the court of appeals.

Respondents are Chem-Tronics, Inc., Daniel R. Buhl, Joe C. Meighan, Charles W. Hord, and Joy Pratt Hord. Respondents were intervenors in the district court and appellants in the court of appeals.

Respondents "by rule" under Rule 12.6 of the Rules of this Court are Wayne Smith, Swan Ranch LLC, Lesco Enterprises, Inc., San Simon Gin, Inc., Gross-Wilkinson Ranch Company, Rex Dolan, and Everett and Joanne Chambers, and all others similarly situated (collectively "Smith Respondents"), all of whom were plaintiffs in the district court and appellees in the court of appeals.

Additional intervenors in the district court did not appeal.

RULE 29.6 DISCLOSURE

None of the corporate Respondents has a parent company and no publicly held company owns 10% or more of the stock of any such Respondent.

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Pursuant to Rule 12.6 of the Rules of this Court, Respondents "By Rule" Wayne Smith, Swan Ranch LLC, Lesco Enterprises, Inc., San Simon Gin, Inc., Gross-Wilkinson Ranch Company, Rex Dolan, and Everett and Joanne Chambers ("Smith Respondents"), submit this Brief in support of the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

STATEMENT OF THE CASE

The Smith Respondents adopt and incorporate by reference the Statement of the Case submitted by Petitioners in their Petition for a Writ of Certiorari.

ARGUMENT

The decision of the Seventh Circuit in this case undermines the ability of parties to resolve overlapping and highly-contested nationwide class litigation by agreement. The decision below reversed the certification of a class for purposes of settlement on two flawed grounds: (i) that the perceived inability of the district court to certify a nationwide class for litigation purposes rendered settling plaintiffs and their counsel "disarmed" and therefore inadequate under Rule 23, precluding certification of a nationwide class pursuant to the settlement agreement; and (ii) that the existence of classes certified for litigation in other jurisdictions, which included members of the settlement class, rendered the settling plaintiffs inadequate as a matter of law under Rule 23 to represent the settlement class. In these respects, the decision below conflicts with the signal precedent of this Court, *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997), and relevant decisions of the Third and Tenth Circuits.

The decision's misapplication of this Court's precedent, and the conflict with other Circuits that is created by the decision, are likely to result in more numerous and further protracted proceedings in circumstances where an equitable and procedurally fair nationwide resolution would otherwise be available. Litigants facing the common scenario of multiple, related class actions will be less inclined to cooperate in a nationwide compromise of such litigation because of this case. Because the Seventh Circuit's decision will interfere with the important role of Rule 23 in resolving numerous parallel class actions by agreement and is directly contrary to established Rule 23 jurisprudence and the sound judicial policy favoring settlement, certiorari should be granted and the judgment of the court of appeals should be reversed.

A. The Decision Below That A Settlement Class May Only Be Certified Where A Litigation Class May Also Be Certified Conflicts With Decisions Of This Court And Other Circuits.

The Seventh Circuit majority relied upon this Court's opinion in *Amchem* when it found that the settling plaintiffs, the Smith Respondents, were "disarmed" when they negotiated the settlement agreement. According to the majority, the criticism of national classes contained in *dicta* in *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001), rendered the settling plaintiffs unable to "use the threat of litigation to press for a better offer" and therefore not in "a good position from which to represent the interests of parties that do wield such a threat." Pet. App. 4a. The implication of this analysis is that, if a class may raise manageability or other issues as to whether it is appropriate for certification for purposes of litigation, no plaintiff will

be adequate to represent a class certified for settlement. The majority's reliance on *Amchem* to support this conclusion directly conflicts with the holding of this Court.

In *Amchem*, this Court was faced in part with the question of whether a settlement class must meet all the requirements of Rule 23(a) and (b). This Court confirmed that settlement classes must satisfy Rule 23(a) and (b), but also held that "settlement is relevant to class certification" and a district court considering certification of a settlement class should acknowledge that "settlement is a factor in the calculus" by which this determination should be made. *Amchem*, 521 U.S. at 619-22. Specifically, this Court held that settlement obviates any inquiry into "whether the case, if tried, would present intractable management problems." *Id.* at 620. Thus, *Amchem* itself refutes any suggestion that the suitability of a proposed class for litigation is controlling in the analysis of whether the class should be certified for settlement.

This Court also did not find the propriety of a litigation class pertinent to whether class counsel were "disarmed" when negotiating a national settlement. Instead, the *Amchem* decision concerned a class of "exposure-only" members with no existing claims – a settlement class for whom *no other litigation* was possible:

> [I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation *despite the impossibility of litigation*, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval *without benefit of adversarial investigation.*

Id. at 621 (emphasis added; citations omitted). As noted by Judge Cudahy in his dissent, the settlement in the present case followed 12 years of litigation in numerous venues, and class counsel "could exert enormous leverage over the defendants" because the alternative was further protracted and disparate litigation. Pet. App. 7a. The Seventh Circuit's conclusion that class counsel were "disarmed" by the perceived unavailability of a national litigation class therefore misconstrues this Court's analysis in *Amchem*, and is in direct conflict with *Amchem*'s requirement that the settlement itself be considered when determining the propriety of certification of a settlement class.

The Petitioners correctly argue that the Seventh Circuit decision is also in conflict with opinions from other Circuits. In the cases of *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004), and *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180 (10th Cir. 2002), the Third and Tenth Circuits properly applied *Amchem* and found that certification of a settlement class was appropriate following a denial of certification for litigation. In light of the conflict between the Seventh Circuit's decision and the opinions in *Amchem*, *Warfarin* and *Rutter & Wilbanks*, this Court should grant certiorari and reverse the decision below.

B. The Decision Below That A Settling Plaintiff Is Inadequate To Represent A Settlement Class That Includes Members Of Pending Statewide Litigation Classes Conflicts With Decisions Of This Court And Other Circuits.

According to the Seventh Circuit panel's majority opinion, the settling plaintiffs were also inadequate under Rule 23(a) to represent members of the settlement class, because the class included members who were also included in statewide classes certified for litigation. Pet. App. 4a. This holding is, in part, based upon the flawed holding, discussed above, that settling plaintiffs and their counsel were "disarmed" under *Amchem*. For reasons discussed at length by Petitioners, however, this holding is also based upon an analysis of the adequacy requirement that ignores the purpose of the requirement and conflicts with this Court's precedent in *Amchem, Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), as well as precedent from the Tenth Circuit in *Rutter & Wilbanks, supra*, and the Third Circuit in *In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220 (3d Cir. 2002).

As Petitioners correctly argue, this Court and other Circuits have consistently held that "adequacy of representation is determined through a case-specific inquiry into whether there is evidence of collusion or some other concrete conflict between the interests of the named plaintiffs and those of absent class members." Pet. 23. The Seventh Circuit decision not only conflicts with these holdings, but ignores the district court's own finding, after extensive discovery and briefing on the issue and review by a court-appointed special master, that there was "no evidence of collusive negotiations in this case." Pet. App. 10a (Cudahy, J., dissenting).

The Smith Respondents agree with and adopt the core argument of Petitioners that the Seventh Circuit decision conflicts with controlling precedent of this Court and other Circuits on this important issue. Conflicting precedent concerning the propriety of settlement classes that encompass subclasses certified for litigation creates a significant obstacle to class action settlements in a large category of cases. In addition, the standard for adequacy of representation in settlement class certification should be clarified. For these additional reasons, certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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